United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7217

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P/S

To be argued by
CHARLES SOVEL

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

COMMERCE TANKERS CORPORATION,

Defendant-Counterclaimant-Appellant,

and

VANTAGE STEAMSHIP CORPORATION,

Intervening Defendant-Appellant,

vs.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff-Appellee.

VANTAGE STEAMSHIP CORPORATION,

Plaintiff-Appellant,

vs.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Defendant-Appellee.

BRIEF FOR DEFENDANT-APPELLEE

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was not the District Court correct in holding that the proximate cause of appellants' alleged damages was the preliminary injunction issued by Judge Frankel?

2. Was not the District Court correct in holding that the NMU's liability was limited to the amount of the injunction bond posted pursuant to the Order granting the preliminary injunction?

COUNTER STATEMENT OF THE CASE

The facts set forth in the Opinion of the District Court (1383a-1438a)* correctly state what occurred. The District Court's findings are supported by substantial evidence and are not clearly erroneous. Accordingly, appellee, NMU, adopts as its statement of facts the factual findings set forth in the District Court's Opinion and will not repeat them here.

There are, however, additional facts which we wish to bring to the Court's attention, not because they are necessary to sustain the District Court's decision, but rather because they become relevant to answering certain of the arguments being made by the appellants.

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* References are to pages of the Joint Appendix filed in this appeal.

1. As admitted by counsel for Commerce, prior to entering into the contract for the sale of the S.S. Barbara the individuals representing Commerce and Vernitron (D. David Cohen, Esquire, and Herman Nathanson) did not bother to read any of the labor contracts governing the vessel and admit, indeed affirmatively lay claim, to having no knowledge of the principles of law governing labor relations in the maritime industry. They retained special counsel, allegedly expert in maritime matters, Kenneth Simon, Esquire, to assist them in the transaction, but while Mr. Simon was generally aware of the provisions in maritime labor contracts dealing with the continuity of unions where a vessel was sold (377a-378a) he, too, did not bother to read the specific provisions of the NMU collective bargaining agreement and gave no consideration to complying with its requirements.

2. While subsection (4) of Article I, Section 2, of the NMU collective bargaining agreement requires the shipowner to give notice to the union of an impending sale or transfer of one of its vessels, neither Vernitron nor Commerce ever gave notice to NMU of their intention to sell the S.S. Barbara. While counsel for Vernitron and Commerce claim that they proceeded openly, and that a story with respect to the impending sale of the vessel appeared in the Wall Street Journal (317a), the fact remains that no notice was sent to the NMU as required by the collective bargaining agreement,

and the union learned of the sale only from other sources, thereby creating the impression to the union that an effort was being made to evade the requirements of the collective bargaining agreement.

3. While counsel for Commerce repeatedly refers to a so-called "commercial divorce" between Vernitron-Commerce and Milton Pilalas, the then managing official of Commerce, the fact remains that Vernitron chose to leave Mr. Pilalas in charge of Commerce's operations, and when Mr. Pilalas responded to the union's inquiry as to Commerce's intentions with respect to complying with Article I, Section 2 (73a), with the statement "I know that the same unions are continuing on the THALIA and have no reason to believe that it will be otherwise with the BARBARA" (74a), the impression given to NMU,and ultimately to Judge Frankel, was one of a deliberate effort to deceive.

4. While counsel for Commerce makes vociferous complaints that there was no transcript and no evidence taken before Arbitrator Kheel, and that he was not even granted a short adjournment to prepare a brief, the fact of the matter is that,at the hearing before Arbitrator Kheel, the issue which counsel for Commerce wished to brief was his contention that the contract clause was in violation of the antitrust laws rather than any factual dispute as to whether Commerce was or was not complying with the contract. Mr.

Kheel informed counsel for Commerce that the application of the antitrust laws was not an issue within his jurisdiction as an arbitrator, and since counsel for Commerce conceded that the contract for sale of the Barbara did not comply with the provisions of Article I, Section 2, Arbitrator Kheel had no alternative but to enter an award enforcing the contract provision. On the only issue before Arbitrator Kheel -- whether or not Commerce had complied with Article I, Section 2 -- there was no dispute of fact and nothing on which to take testimony. In that posture, Commerce's request for an adjournment only served to further create the impression that it was seeking to delay action so that it could transfer the vessel before a decision could be issued.

5. Counsel for Commerce states, at page 11 of his brief, that NMU obtained an ex parte injunction before Judge Wyatt enforcing the arbitral award of Arbitrator Kheel. This is absolutely and totally false. There is not a Judge in the Southern Districe of New York who would enter such an injunction ex parte, particularly when the party to be enjoined is represented by counsel known to the party seeking the injunction. In the instant case, Kenneth Simon, Esquire, who was then the counsel appearing on behalf of Commerce Tankers Corporation, was notified in advance of the application being made by NMU before Judge Wyatt, was present when it was made, and made no objection thereto, nor did he make any

objection to the amount of the bond that Judge Wyatt required. In fact, the Order to Show Cause signed by Judge Wyatt reflects the fact that it was done on notice to Commerce (5a-6a, 68a-69a). Thereafter, Mr. Simon, on behalf of Commerce, requested a week adjournment on the hearing on the preliminary injunction and prepared a stipulation in which he consented to the continuation of the restraint and the amount of the bond set in Judge Wyatt's Order of February 9, 1971 (7a).

6. Finally, with respect to Commerce's efforts to mitigate damages, the evidence at trial disclosed that there had been negotiations between Commerce and Vantage to work out a procedure pursuant to which Commerce would operate the vessel under the SoCal charter with the profits therefrom going to Vantage so that the charter would not be lost. Arrangements were going along smoothly and SoCal apparently was in agreement when, at the last minute, Mr. Cohen, acting as counsel for Commerce, stated that, as a condition of the arrangement, Vantage had to agree that, if at the end of the term of the NMU-Commerce collective bargaining agreement, which was June 15, 1972, the NMU still insisted upon Vantage undertaking the NMU Agreement, then Vantage would agree to do so. Mr. Corletta, on behalf of Vantage, could not so agree, became disgusted and the negotiations broke down

and the charter was lost (1255a-1256a). The requiring of this condition by Mr. Cohen, which was the ultimate cause of the loss of the charter, can only be attributed to a further failure on his part to read and comprehend the collective bargaining agreement, for Article I, Section 2, clearly stated that it applies only "during the term of this Agreement" (Article I, Section 2(a)) (65a).

The circumstances which led to the ultimate loss of the charter are but one illustration of what will become apparent to anyone reviewing the record of what occurred in this case, namely that, notwithstanding the rhetoric, accusations and vituperative affidavits filed by counsel for Commerce, the real reason for the losses suffered by Commerce was their own mishandling of the transaction as manifested by the failure to read the collective bargaining agreement and to be familiar with applicable law before undertaking a transaction involving an asset worth close to $3,000,000.00*.

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*Perhaps there is no better illustration of what we mean than the affidavit filed by Mr. Cohen in support of his post-trial motion (1456a to 1472a). In that affidavit everyone from counsel for NMU to Judges Griesa and Frankel are accused of a wide variety of improprieties. Thus Judge Griesa's findings are characterized as "severe and ungenerous accusation against me and my co-counsel to our great personal and professional prejudice"(1459a). Judge Griesa's reference to Commerce's 4-1/2 month delay in pursuing appellate remedies is described as "grotesquely unfair to Commerce and indecent to me and others" (1465a) (Emphasis supplied). Judge Frankel's Opinion is characterized as an "ill-advised and intemperate decision" (1469a-1470a), and Judge Frankel is further accused of having "stepped down from the bench to assume the role of advocate for

(Footnote continued)
the plaintiff" (see footnote at 1470a). Mr. Cohen then concludes with the assertion that he apologizes to no one for his "frank talk and vivid language" (1471a), that he bridles under the suggestion that he or his co-counsel were in any way laggard in pursuing Commerce's remedies, and that the District Court had an "obligation to counsel" (emphasis in original) to amend its findings his way (1472a). "Frank talk and vivid language"are all part of the "slings and arrows" of the practice of law for which Mr. Cohen can be excused even if he chooses not to apologize. We can not say the same, however, for his simple failure to know the applicable law and read the applicable labor contracts before undertaking to represent a client in a transaction of this magnitude.

ARGUMENT

POINT I

The Findings Of The District Court Are Amply Supported By The Evidence And Are Not "Clearly Erroneous."

Perhaps no principle is more firmly rooted in appellate law than that which dictates that the findings of fact of a District Judge in a case tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." See Fed.R.Civ.P. 52(a); United States v. Yellow Cab Co., 338 U.S. 338 (1949); Graver Tank & Mfg. Co. v. Linde Air Products Co., 339 U.S. 605 (1950); United States v. Aluminum Co. of America, 148 F.2d 416 (2nd Cir. 1945); See 5A Moore's Federal Practice, Paragraph 52.03.

In the instant case, the District Judge made lengthy and detailed findings of fact. These findings are amply supported by the evidence and are not "clearly erroneous." To a large extent, particularly with respect to the antitrust claims, appellants' arguments on this appeal are determined adversely to them by the factual determination made by the District Court. Accordingly, we will not burden the Court with a lengthy recitation of the evidence nor with an extensive discussion of legal principles of antitrust law which have become irrelevant in view of the District Court's fact findings.

There is, in realty, only one issue on this appeal -- the application of the injunction bond rule -- which we will discuss at length in Point II of this brief. However, and only as a preliminary thereto, we wish to point out a few of the fact findings of the District Court, which, we submit, dispose of appellants' arguments on all issues other than the application of the injunction bond rule.

One of the principal arguments made by Commerce and Vantage with respect to their antitrust claims was that the NMU conspired with the large shipping companies for the adoption of provisions in the industry collective bargaining agreement which would favor the large companies competitively against the smaller companies. Judge Griesa rejected this argument, finding:

> "I reject the contention of Commerce and Vantage that the TSC and MSC, as far as any issue in this case is concerned negotiated improperly for the benefit of the larger companies vis-a-vis the smaller companies such as Commerce. The restraint on transfer clause was a demand by the unions on all the companies, large and small. There is no evidence whatever to suggest that the larger companies promoted the restraint on transfer clause in any way, or regarded it as a device to benefit them at the expense of the smaller companies. As to the matter of maintaining the pool of contributors to the union pension funds, it is clear that this is one of the reasons why the unions demanded the restraint on transfer clause from all the companies. However, there is no evidence that the larger companies sought the restraint on transfer clause in order to lock smaller

companies into the group of pension fund contributors. There is also no support in the evidence for the contention that the restraint clause was intended to encourage sales to foreign companies, thus reducing competition in United States flag trade." (1413a-1414a) (Emphasis in original)

Judge Griesa made extensive and detailed supporting findings for the foregoing conclusions (1399a-1413a).

Judge Griesa disposed of the argument that NMU engaged in "coercive" conduct on a factual basis as follows:

"The argument that NMU coerced Commerce into entering into the collective bargaining agreement containing the restraint on transfer clause is contrary to the facts. Commerce was content to have the TSC representatives, who had the maximum bargaining power, negotiate on its behalf. Commerce declined the invitation to participate in the negotiations, and took no exception to the terms agreed to by its de facto representatives. The practical necessities of this type of bargaining do not constitute the type of coercion requisite for a violation of Section 8 (b) (4).

"I also reject the argument that the strike threat contained in Article I, Section 2, exerted coercion and force on Commerce and Vantage, causing the frustration of the sale of the Barbara to Vantage and the charter of Barbara to SoCal. These arguments have no factual support. The strike provision in Article I, Section 2, did not prevent Commerce from making the agreement for the sale of the Barbara to Vantage. When it came to enforcing Article I, Section 2, NMU did not strike or threaten to strike. NMU went to arbitration and then to court. As to the SoCal charter, this was frustrated as a result of the preliminary injunction and the impatience

> of SoCal with the legal complications with the NMU. SoCal did not cancel because of any coercion from the strike threat."
> (1428a-1429a)

Finally, Judge Griesa found, and the evidence clearly supports, indeed compels, the conclusion that the proximate cause of the delay and final frustration of the sale of the S.S. Barbara was the preliminary injunction issued by Judge Frankel, and not any violation of the antitrust laws. Thus, Judge Griesa found:

> "The proximate cause of the delay and final frustration of the S.S. Barbara transactions was the preliminary injunction issued by Judge Frankel in a case admittedly involving close and difficult questions of law. The problem created by the injunction was compounded by the long delay of Commerce and Vantage in seeking an appellate remedy.
>
> "There can be no recovery in this case on any theory of antitrust violation. Commerce and Vantage can recover only to the extent permitted by the specific rules relating to the injury suffered as a result of the granting of an injunction." (1432a-1433a).

Commerce and Vantage seek to escape the impact of this latter fact finding, which, it may be added, is the most obvious fact in the entire case, by arguing that NMU's alleged violations of the antitrust laws were at least a "concurrent" cause of the sale not going through because, in the absence of Article I, Section 2, there would have been no arbitral award and no injunction. In a strictly "tort" sense, the

injunction issued by Judge Frankel was not a concurrent cause; rather, it would be a superseding cause because it occurred subsequent to the negotiation of the collective bargaining agreement and subsequent to the arbitration award, cf., Restatement of Torts, 2d, Sections 440 and 441. Even more to the point, however, is that tort principles relating to causation cannot be applied where the conduct in question is resort to the courts for the determination and enforcement of rights. Access to the courts to determine a dispute, be it a contractual dispute, one under the antitrust laws, or otherwise, is a cornerstone of our democratic system. We do not litigate at our peril. We take controversies to court because that is where they are supposed to be taken, and, absent bad faith or malicious prosecution, no liability ensues from an erroneous decision by the Court.

In the area of the antitrust laws, this principle finds support in Eastern Railroad Pres. Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), in which the Court held that a conspiracy among competitors to take action to influence public officials was not conduct prohibited by the antitrust laws, regardless of its anti-competive purpose. The Noerr decision was followed in United Mine Workers of America v. Pennington, 381 U.S. 657, 670 (1965), where the Court stated:

> "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." (Emphasis supplied)

The Court went on to say, referring to certain actions by the United Mine Workers Union to influence a decision of the Secretary of Labor, 381 U.S. at 670:

> "Neither finding, however, is permitted by Noerr for the reasons stated in that case. Joint efforts to influence public officials do not violate the antitrust law even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act."(Emphasis supplied)

The Noerr principle has been applied with equal force where the resort has been to the courts rather than to officials of state or federal agencies. Thus, in California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-11, 92 S. Ct. 609, 612 (1972), the Court stated:

> "We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interest vis-a-vis their competitors." (Emphasis supplied)

Other cases upholding and applying the Noerr doctrine are Semke v. Enid Automobile Dealers Association, 456 F. 2d 1361, at 1366 (10th Cir. 1972), Sun Valley Disposal Company v. Silver State Disposal Co., 420 F. 2d 341, at 342 (9th Cir. 1969), and Bracken's Shopping Center, Inc. v. Ruwe, 273 F. Supp. 606

(S.D.Ill. 1967). In Bracken the court dismissed an action under the antitrust laws where the plaintiff alleged that the defendants had filed suit in a State court to challenge the validity of a statute under which they sought to construct a shopping center. The Court held that no cause of action had been stated, relying on the authority of Noerr and Pennington as follows:

> "Apparently recognizing the difficulty inherent in the proposition they urge, the plaintiffs argue that it is not the filing of the law suit itself but the common motive behind the filing thereof, arrived at by agreement, that violates the Sherman and Clayton Acts. First, it would appear that the Railroad Presidents and Pennington cases cited above foreclose inquiry into motive. In the Railroad Presidents case, the Supreme Court declared 365 U.S. at page 136, 81 S.Ct. at page 529:
>
> > 'We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.'
>
> "And in the Pennington opinion the Supreme Court observed 381 U.S. at page 670, 85 S. Ct. at page 1593:
>
> > 'Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition.'
>
> "Second, it appears that the trial court has rendered judgment in favor of the defendants in the state court suit complained of. At least one test of good faith is the existence of probable cause; and the

> judgment of the trial court in the state action, even if reversed on appeal, has conclusively shown that defendants had probable cause to believe that the municipal ordinance was invalid. Their decision to act on that belief, even if motivated by a desire to prevent the construction of the Bracken shopping center and thereby restrain competition, does not violate the antitrust laws. Regardless of intent or assumed purpose, defendants have a right to have the ordinance set aside if it is invalid." (Emphasis supplied)

Under Noerr and Pennington, NMU had an absolute right to go to Court to seek to vindicate what it believed its rights to be. Even if it were ultimately determined that the underlying agreement which the NMU sought to enforce was in violation of the antitrust laws, the NMU still had the right to present its claim to the Court and let the Court determine whether or not the agreement was in violation of the antitrust laws. Even if damage should flow from the Court's decision, later reversed on appeal, the importance of preserving access to the Courts as a means of resolving disputes requires that such damage be recognized as flowing from the Court's decision, and not from a violation of the statute which the Court was being asked to interpret.

POINT II.

The District Court Correctly Held That NMU's Liability Was Limited To The Amount Of The Injunction Bond

The District Court held that NMU's liability was limited to the amount of the injunction bond which it was required to post (1435a). The Court stated the applicable rule as follows:

> "In the absence of malicious prosecution, the seeking of injunctive relief is not a tort. However, a party obtaining a preliminary injunction may be required, as a condition of obtaining the injunction, to provide a bond or other undertaking to indemnify the defendant for injuries resulting from the injunction, if the injunction is later overturned. In such a case recovery by the injured party is limited to the amount of the bond or undertaking." (1434a).

The cases supporting the foregoing rule are legion, see Associated General Contractors v. Illinois Conference of Teamsters, 486 F.2d 972, 975 n.6 (7th Cir. 1973); United Motors Service, Inc. v. Tropic-Aire, Inc., 57 F. 2d 479, 483 (8th Cir. 1932); First-Citizens Bank & Trust Co. v. Camp, 432 F. 2d 481 (4th Cir. 1970); International Ladies Garment Workers Union v. Donnelley Garment Co., 147 F. 2d 246 (8th Cir. 1945), cert. denied, 325 U.S. 852; Atomic Oil Co. of Oklahoma v. Bardahl, 419 F. 2d 1097 (10th Cir. 1970), cert. denied, 397 U.S. 1063 (1970). In In Re Spencer Kellogg & Sons, 52 F. 2d 129, 134-135 (2nd Cir. 1931), this Court stated:

> "It was the court, not the company, which prevented the claimants from proceeding; it was the court which declared that the company need not

> pay at once. True the company had procured the order, and was its author in a sense which would have associated it in responsibility, had the court been a juristic person. It was not, and the company was insulated from legal liability. Anyone who acts honestly and does not subject himself to a charge of malicious prosecution is as free from liability in invoking the action of a court as the court itself, and what he does under its order is not a wrong. The party aggrieved has no remedy except insofar as the court may have protected him by bond or otherwise, as a condition upon the order, and as security against its own errors. (Emphasis supplied)

Despite the massive authority supporting the injunction bond rule, counsel for Commerce and Vantage spend a considerable portion of their briefs attacking it with statements such as it developed "from historically misconstrued Supreme Court precedents" (Commerce brief, page 34), that it is unconstitutional (Commerce brief, page 35), and that it should be rejected in favor of the Third Circuit's decision in United States Steel Corp. v. United Mine Workers, 456 F. 2d 483 (3rd Cir. 1972), cert. denied 408 U.S. 923 (1972) (Commerce brief, page 31, Vantage brief, page 36). We will consider each of these arguments seriatum.

It is fundamental in our jurisprudence that the bringing of a law suit, even one which is ultimately lost, is not tortious and does not give rise to a claim for damages.

Attempts to erode this principle by allowing awards of counsel fees and excessive costs have been rejected, e.g., Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967); Farmer v. Arabian American Oil Co., 379 U.S. 227 (1964). The only exception to this rule is the right to sue for malicious prosecution where a suit has been brought in bad faith and without probable cause, e.g., Brault v. Town of Milton, 527 F. 2d 730 (2nd Cir. 1975).

The granting of an injunction is an equitable remedy. A suit for malicious prosecution is an action at law. Historically, the law courts were separate from the courts of equity and there could be no separate action in equity for damages. In fact, one of the historical defenses to equity jurisdiction was that the claimant had an adequate remedy at law. However, while the chancellor in equity could not award damages directly, he had broad discretion to frame orders granting injunctions, and from this broad discretion developed the practice of conditioning the grant of a preliminary injunction on the plaintiff's agreement to post a bond to cover any damages that may be incurred should the injunction be determined to have been improvidently granted. In posting the bond, the plaintiff in effect waived his right not to be liable for a non-maliciously brought suit and voluntarily consented to liability up to the amount of the bond. The

accepting of the terms of the injunctive order, coupled with the posting of the bond, constituted a waiver or an agreement by the party seeking the injunction to be liable up to the amount of the bond should the injunction subsequently be set aside. The basis of the liability is not the bond but rather the undertaking implicit in the posting of the bond whi h is a consent to liability up to the amount of the bond without the necessity of establishing a cause of action for malicious prosecution. In this manner the bond, and the undertaking implicit therein, becomes the "price" imposed by the chancellor as a condition for granting injunctive relief.

That the foregoing is the correct analysis of the origin of the injunction bond rule appears from Justice Cardozo's Opinion in City of Yonkers v. Federal Sugar Refining Co., 221 N.Y. 206, 116 N.E. 998 (1917), where he stated:

> "There was no liability at common law for damages resulting from an injunction erroneously granted unless the case was one of malicious prosecution...Some times the Chancellor makes his order conditional upon the plaintiff's undertaking to assume the damages...But without such a condition the defendant had no remedy against the honest and cautious suitor." id at p. 998.
>
> "...The rule is not changed where the plaintiff signs without sureties. The undertaking is still the source and measure of liability. Lawton v. Green, supra; Palmer v. Foley, supra. It is true that the court may increase the amount of an undertaking which is found to be inadequate. Code Civ. Proc. Section

> 567, arrest; section 629, injunction; section 682, attachment. A plaintiff then has the opportunity, if he thinks the security excessive, to abandon his injunction. In any case, he counts the cost, and assumes a liability whose maximum is a determinate amount." id at p. 998-999. (Emphasis supplied)

City of Yonkers v. Federal Sugar Refining Co., supra, has been cited with approval through to the present day. Among the cases which have recognized it as setting forth the law of New York are City of Utica v. Hanna, 249 N.Y. 26, 162 N.E. 573, 574 (1928); A. Sherman Lumber Co. v. Kildare Club, 174 N.Y.S. 769 (1919); Snyder v. Snyder, 174 N.Y.S. 729 (1919); McColgan v. Dodds, 209 N.Y.S. 707 (1925); Bedell Co. v. Harris, 240 N.Y.S. 550, 228 App. Div. 529 (1930); Town of Oyster Bay v. Forte, 225 N.Y.S. 2d 860 (1961); Mary Chess, Inc. v. Stanco, 231 N.Y.S. 2d 474 (1962); Liza Co. v. Mark Hellinger Theatre, Inc., 28 A.D. 2d 831, 281 N.Y.S. 2d 418 (1967); Demisay, Inc. v. Petito, 300 N.Y.S. 2d 149 (1969); Byrne v. Long Island State Park Commission, 323 N.Y.S. 2d 442, 458 (1971); Subin v. United States Fidelity and Guarantee Co., 208 N.Y.S. 2d 278, 12 A.D. 2d 49 (1960); Bonert v. White, 187 N.Y.S. 2d 483 (1959); Superior Tool & Die Co. v. Bailey, 187 N.Y.S. 2d 587 (1959); Ward v. Feltman, 76 N.Y.S. 2d 473 (1947).

In Russell v. Farley, 105 U.S. 433 (1881), perhaps the leading case in the United States on the proposition that injury resulting from judicial act, including injunction,

is damnum absque injuria, the Court, in referring to the English authorities stated, 105 U.S. at 443:

> "The Lords Justices thought that it would be unjust to the defendant to disregard, or not to give effect to, the undertaking which was the price at which the plaintiff accepted the injunction..." (Emphasis supplied)

In Russell v. Farley, supra, the Court also held in unequivocal terms that damage resulting from the act of the Court, including the issuance of an injunction, was damnum absque injuria. It is because of this that the Chancellor in Equity has discretion to condition the granting of an injunction, and, as we have demonstrated, the acceptance of the conditions then becomes the price which the party seeking the injunction agrees to pay for this form of relief. In Russell v. Farley, the Court stated, 105 U.S. at 438:

> "It is a settled rule of the Court of Chancery, in acting on applications for injunctions, to regard the comparative injury which would be sustained by the defendant, if an injunction were granted, and by the complainant, if it were refused. Kerr on Injunctions, 209, 210. And if the legal right is doubtful, either in point of law or fact, the court is always reluctant to take a course which may result in material injury to either party; for the damage arising from the act of the court itself is damnum absque injuria, for which there is no redress except a decree for the costs of the suit, or, in a proper case, an action for malicious prosecution. To remedy this difficulty, the court, in the exercise of its discretion, frequently resorts to the expedient of imposing terms

> and conditions upon the party at whose instance it proposes to act. The power to impose such conditions is founded upon, and arises from, the discretion which the court has in such cases, to grant, or not to grant, the injunction applied for. It is a power inherent in the court, as a court of equity and has been exercised from time immemorial." (Emphasis supplied)

Similarly, in Meyers v. Block, 120 U.S. 206 (1887), the Supreme Court stated at page 211:

> "By the law of Louisiana, damages may be recovered for suing out an injunction without just cause, independently of a bond. Florance v. Nixon, 3 La. Rep. 291. But this can not be done in the United States courts. Without a bond, no damages can be recovered at all. Without a bond for the payment of damages or other obligations of like effect, a party against whom an injunction wrongfully issues can recover nothing but costs, unless he can make out a case of malicious prosecution. It is only by reason of the bond, and upon the bond, that he can recover anything. When, therefore, the condition of the bond in these cases declares that the obligors will pay such damages as the obligee may recover against them, it must mean that they will pay such damages as he may recover by a suit on the bond itself." (Emphasis supplied)

Counsel for Commerce states at page 34 of his brief, that the injunction bond limitation rule "developed from historically misconstrued Supreme Court precedents." We do not comprehend the nature of this alleged misconstruction and if there has been a misconstruction, it is one that has been concurred in by some of the most distinguished jurists in our country's history. The error in the argument of counsel for Commerce is that he is assuming that, absent the provisions of

Fed.R.Civ.P. 65, there would be absolute liability for wrongful injunction, when, in fact, the situation is reversed. Rule 65 creates a limited exception to the general rule of no liability for wrongful injunction, absent proof of malicious prosecution.

Commerce's argument that the injunction bond rule operates as a denial of due process of law is fully answered by this Court's recent en banc decision in Brault v. Town of Milton, 527 F. 2d 730, 738-739 (2nd Cir. 1975), as follows:

> "The gist of the Braults' complaint is that the Town violated their due process rights by invoking the processes of the Vermont state courts to enforce an ordinance which turned out to be invalid. Absent a claim of malice -- and no such claim is stated here -- a plaintiff's use of judicial process for enforcement of an alleged right is the very antithesis of denial of due process... However, the Fourteenth Amendment does not protect a litigant against judicial error, Gryger v. Burke, 334 U.S. 728, 731, 68 S.Ct. 1256, 92 L.Ed. 1683 (1948)... If every unsuccessful lawsuit were to be viewed as a violation of due process, bonafide litigants would be deterred from invoking the courts to adjudicate their claims, since a plaintiff would risk substantial damages if his claim should not be upheld. Not even the courts of England which, unlike our own, impose very substantial costs upon the unsuccessful litigant, have permitted recovery of damages for a civil suit brought in good faith; indeed, they have been reluctant to impose any liability at all for wrongful institution of civil proceedings. ..."

Counsel for Commerce seeks to escape the impact of this holding by challenging the regularity of the proceedings before Arbitrator Kheel and Judge Frankel, and defending Commerce's own failure to seek speedily appellate review of Judge Frankel's Order. All these arguments can be quickly and easily answered.*

Insofar as the proceeding before Arbitrator Kheel is concerned, no witnesses were heard and no evidence was taken because there was nothing on which to hear witnesses or to take evidence. Commerce admitted that it was transferring the vessel to Vantage and had not complied with Article I, Section 2. No evidence was necessary on that point. Insofar as Commerce was challenging Article I, Section 2, on anti-trust grounds, Arbitrator Kheel correctly advised Commerce that this was not an issue that he could determine. Thus, there was no denial of procedural fairness before Arbitrator Kheel, and, if there was, this is a matter which could and certainly should have been raised in defense against the preliminary injunction, and on an immediate appeal therefrom.

The statement at page 36 of Commerce's Brief that the application for the preliminary injunction was made

*Any such alleged irregularities should have been raised in the prior appeal from the granting of the preliminary injunction. They are totally irrelevant at this stage of the litigation, particularly when the basis for this Court's prior reversal of the injunction was not any alleged procedural irregularities but rather because of the entrance into the case of the NLRB.

"without notice of motion" and "without a hearing", is simply false. The Order to Show Cause signed by Judge Wyatt (5a-6a) was the notice of motion, and there was a lengthly argument before Judge Frankel. Before Judge Frankel both sides argued questions of law, not questions of fact, and, therefore, there was no need to take testimony. Moreover, if there was a factual issue on which Judge Frankel failed to take testimony or other procedural irregularity, such error certainly would have been given immediate attention by this Court on an expedited appeal. Counsel for Commerce makes the unique argument that they did not seek an immediate appeal because they did not think that they could overturn Judge Frankel's Order on the record as it then existed. This statement is a tacit admission that the proceedings before Judge Frankel could not be attacked for violation of procedural due process.

Finally, counsel for Commerce and Vantage argue that they may recover damages in excess of the injunction bond under the decision in United States Steel Corp. v. United Mine Workers of America, 456 F. 2d 483 (3rd Cir. 1972). They concede that the decision in United States Steel Corp. v. United Mine Workers of America, supra, represents a minority view; indeed, it is so much a minority view that it is the only decision which so holds, and was expressly rejected by the 7th Circuit in a subsequent case, Associated General Contractors v. Illinois Conference of Teamsters, 486 F. 2d 972 (7th Cir.1973).

Moreover, in addition to being very much a minority view, the decision in United States Steel Corp. v.United Mine Workers of America, supra, is also easily distinguished from the instant case, and, for this reason alone, is not authority for the position argued by Commerce and Vantage.

United States Steel Corp. v. United Mine Workers of America, supra, involved a claim by a union to recover the attorneys' fees which it incurred in defending and ultimately reversing, an injunction which had been obtained by an employer under the provisions of Section 7 of the Norris-LaGuardia Act, 29 U.S.C.A. § 107. Contrary to the argument being made here by Commerce and Vantage, the Third Circuit did not reject the analysis of the injunction bond rule as being based on a waiver of the right not to be liable for instituting legal proceedings absent malicious prosecution. On the contrary, the Court expressly adopted this analysis, but in the circumstances there presented, found that there was such a waiver by virtue of the provisions of Section 7 of the Norris-LaGuardia Act under which the injunction in that case had been granted.

The Court stated that the case presented three issues:

(1) Does the bond (i.e., the undertaking) which was filed, properly construed, exclude liability for

attorneys' fees? The Court answered this in the negative by holding that the bond would have to be construed to be consistent with the provisions of Section 7 of the Norris-LaGuardia Act, see 456 F. 2d at 490.

(2) Assuming that the bond does not exclude liability for attorneys' fees, is the liability of the principal, as distinguished from the surety, limited to the amount of the bond? Here the Court held that the liability of the surety was separate from the liability of the principal, and that a limition on the surety's liability did not necessarily preclude greater liability by the principal on its own undertaking, see 456 F. 2d at 490.

(3) Does Section 7 of the Norris-LaGuardia Act impose liability on the principal, i.e., the party obtaining an injunction, by its own operation in the absence of a bond? Here the Court construed Section 7 of the Norris-LaGuardia Act as a total waiver of the right not to be sued for wrongful injunction irrespective of the amount of the bond. In this respect, Section 7(e) of the Norris-LaGuardia Act provides:

> "No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the Court sufficient to recompense those enjoined for any loss, expense or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorneys' fee) and expense

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> of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the Court." (Emphasis supplied)

The Third Circuit interpreted those portions of Section 7 which we have underlined above as constituting an undertaking of full liability independent of the amount of the bond. Said the Court, 456 F. 2d at 492:

> "The question, then, is how far Congress intended to go beyond the remedy which existed at common law. Section 7 does say that an amount shall 'be fixed by the Court', but in the context this language seems to modify the words 'adequate security' rather than the word 'undertaking'. Read thus, the amount to be fixed by the court refers to the limit of liability of a surety or the amount of collateral security required in the absence of a surety. The plaintiff's required undertaking would then read 'sufficient to recompense those enjoined for any loss, expense or damage...including all reasonable costs (together with a reasonable attorney's fee) and expenses of defense against the order...' Such a reading would permit recovery against the plaintiff in excess of the amount fixed in the bond."

With all due respect to the Third Circuit, we submit that this is a rather tortured reading of the statutory language, which undoubtedly accounts for its subsequent rejection by the 7th Circuit, see Associated General Contractors of Illinois v. Illinois Conference of Teamsteers, 486 F. 2d at 974-975.

In any event, it is clear that the decision in United States Steel Corp. v. United Mine Workers of America,

supra, is based on the specific language of Section 7 of the Norris-LaGuardia Act. In the instant case, the injunction was not issued under Section 7 of the Norris-LaGuardia Act and, moreover, could not have been. Thus, as Judge Griesa points out in his Opinion (1406a) and as the record clearly indicates (5a),* the motion for a preliminary injunction was brought under Rule 65 of the Federal Rules of Civil Procedure and was granted under that Rule. Rule 65 contains no language which is comparable to the alleged waiver which the Third Circuit found in Section 7 of the Norris-LaGuardia Act.

In addition, the instant suit was a suit to enforce an arbitration award and as such is not under the Norris-LaGuardia Act. This point was decided by the Supreme Court in Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1957), where the question before the Court was whether an injunction could issue to compel compliance with the arbitration provisions of a collective bargaining agreement in view of the provisions of the Norris-LaGuardia Act which prohibited injunctions in labor disputes. It was clear that

*In the Order to Show Cause signed by Judge Wyatt, it was specifically stated that the application was "pursuant to Fed. R. Civ.P. 65" (5a).

if the dispute involved was a "labor dispute" within the meaning of the Norris-LaGuardia Act, an injunction could not issue. However, the argument which was made that the purpose of the Norris-LaGuardia Act was to prevent injunctions against union efforts to organize and to negotiate collective bargaining agreements, and once a union had organized and had negotiated a collective bargaining agreement, the "labor dispute" was at an end and the enforcement of such an agreement was not a "labor dispute" within the meaning of the Norris-LaGuardia Act. This view was adopted by the Supreme Court in the Lincoln Mills decision, as follows, 353 U.S. at 457-459:

> "The question remains whether jurisdiction to compel arbitration of grievance disputes is withdrawn by the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. Sec. 101 et seq., 29 U.S.C.A. Section 101 et seq. Section 7 of that Act prescribes stiff procedural requirements for issuing an injunction in a labor dispute. The kinds of acts which had given rise to abuse of the power to enjoin are listed in Section 4. The failure to arbitrate was not a part and parcel of the abuses against which the Act was aimed. Section 8 of the Norris-LaGuardia Act does, indeed, indicate a congressional policy towards settlement of labor disputes by arbitration, for it denies injunctive relief to any person who has failed to make 'every reasonable effort' to settle the dispute by negotiation, mediation, or 'voluntary arbitration.' Though a literal reading might bring the dispute within the terms of the Act, (See Cox, Grievance Arbitration in the Federal Courts, 67 Harv. L. Rev. 591, 602-604), we see no justification in policy for restricting Section 301(a) to damage suits, leaving specific performance of a contract

> to arbitrate grievance disputes to the inapposite procedural requirements of that Act... The congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes being clear, there is no reason to submit them to the requirements of Section 7 of the Norris-LaGuardia Act." (Emphasis supplied)

The Third Circuit's decision in United States Steel Corp. v. United Mine Workers of America, supra, does not reject the principle that liability for wrongful injunction rests upon a waiver of the right to be free from such liability absent malicious prosecution. Rather, there the Court found the required undertaking in the statutory language, the plaintiff having proceeded under Section 7 of the Norris-LaGuardia Act. In the instant case, the NMU did not proceed under the Norris-LaGuardia Act and there is no basis in Fed. R. Civ. P. 65 for finding an implied waiver of the right not to be liable in excess of the injunction bond absent malicious prosecution.

CONCLUSION

For all the foregoing reasons, the decision of the Court below limiting the NMU's liability to the amount of the injunction bond clearly is correct and should be affirmed.

Respectfully submitted,

PHILLIPS & CAPPIELLO
Attorneys for Appellee

Of Counsel:

Charles Sovel
Ned R. Phillips

A 202 Affidavit of Personal Service of Papers LUTZ APPELLATE PRINTERS, INC.

FEDERAL COURT
SECOND DEPARTMENT

COMMERCE TANKERS CORP. Defendant-Counterclaim-Appellant and VANTAGE STEAMSHIP CORP. Intervening def.-app. - against - NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, Plaintiff-Appellee.	*Index No.* *Affidavit of Personal Service*

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Reuben A. Shearer *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 211 West 144th Street, New York, New York 10030

That on the 30th *day of* August *19*76 *at* 500 Fifth Avenue New Yjork, N.Y.

deponent served the annexed brief Surrey, Karasik, Morse & Seham, Esqs. *upon*

the Intervening def-app *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.*

Sworn to before me, this 30th
day of August *1976*

Beth A. Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. [illegible]
Qualified in Nassau County
Commission Expires March 30, 1978

Reuben Shearer
Reuben Shearer

A 201 Affidavit of Service by Mail — LUTZ APPELLATE PRINTERS, INC.

FEDERAL COURT
SECOND DEPARTMENT

COMMERCE TANKERS CORP.,
Defendant-Counterclaim-Appellant,
and Intervening
VANTAGE STEAMSHIP CORP. Def.-app.
- against -
NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Plaintiff-Appellant.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF ss.:

I, Velma N. Howe, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 298 Macon Street, Brooklyn, New York 11216
That on the 30th *day of* August *19* 76, *deponent served the annexed*

briefs *upon* David Cohen *attorney(s) for* Defendant-counterclaim-~~Intervening def.-app.~~ Appellant *in this action, at* 75 Community Drive Great Neck, N.Y.

the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 30th
day of August *19* 76.

Velma N. Howe
Velma N. Howe

Beth A. Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York